Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 621(a)(1) of the Cable	)	MB Docket No. 05-311
Communications Policy Act of 1984 as Amended	)	
by the Cable Television Consumer Protection and	)	
Competition Act of 1992	)	

COMMENTS OF CHARLES COUNTY, MARYLAND

Charles County, Maryland hereby submits and files the following comments with the Federal Communications Commission in response to the Second Further Notice of Proposed Rulemaking in the above-referenced docket.

I. THE VITAL ROLE OF LOCAL COMMUNITY MEDIA IN CHARLES COUNTY

Charles County, Maryland (hereinafter "Charles County") is in the Greater Washington, D.C. Metropolitan Area and, like other similarly-situated counties, has both suburban and rural characteristics. Charles County is along a major traffic corridor that runs south from Washington, D.C. into Virginia. The County is growing rapidly, especially in the northern section where it neighbors a larger Washington, D.C. Metro Area county.

Two cable operators serve Charles County under non-exclusive franchise agreements; Comcast with a traditional hybrid fiber coax system and Verizon FiOS with a fiber to the home system. The cable systems largely overlap each other and provide vigorous competition. Both Comcast and Verizon have equivalent obligations related to the carriage of Public, Educational and Governmental (PEG) Access channels and yet this has not hampered their growth, in either system development or revenue per subscriber. Charles County is also provided with an institutional network (I-Net), the costs of which are fully born by cable subscribers in the County via "pass-through billing" charges.

Emphatically, in Charles County, PEG channels and capacity have substantial value to subscribers, the public, and programmers, including the College of Southern Maryland (CSM), which provides both its own Higher Educational Access Channel as well as facilitating the Charles County Local Public Access Channel (LPACC); and Charles County Public Schools (CCPS) which operates a K-12 Educational Access Channel.

All of these organizations receive their PEG channels and capacity as a public benefit based on the negotiated provisions in the County's two franchise contracts. For example, The College of Southern Maryland provides access to video production facilities and equipment (funded in large part by PEG capital fees from the two operators) through the Charles County Local Public Access Channel to residents County-wide, as well as residents of incorporated municipalities that also provide for Public Access Channels in their franchise contracts.

This is similar for Educational Access. School districts, such as the Charles County Public Schools (CCPS), use their channel for a variety of purposes, including: education; outreach to parents and other residents; information about the School District's activities, events and occurrences; and as an important training mechanism for students to become adept in video and multimedia content production and potentially have a future career in the field.

CCPS takes advantage of the PEG fee to procure a large part of the equipment for its K-12 Educational Access Channel and uses its own operating funds to support the administration and operation of the Channel. CCPS makes a considerable investment in its PEG Channel, by funding its operational cost. Although CCPS funds much of its capital equipment, cable subscribers fund a substantial portion via "pass-through billing" fees. For this reason, it is fundamental for the Federal Communications Commission (hereinafter "FCC") to recognize that PEG capital costs ostensibly "paid" by cable operators in Charles County are actually born by the cable subscribers via pass-through charges. Although "pass-through billing" is firmly within the boundaries of the Act, such practice does not destroy the fact that cable customers fund PEG capital costs.

For nearly 20 years, Charles County has worked diligently to ensure that the benefits of Public, Educational and Governmental Access communications reach all County subscribers while ensuring, through multiple Needs Assessments specifically targeted at the portions of the County served by each franchisee, that the needs assessed would be balanced with taking into account the reasonableness of the cost related to the cable operator and the cable subscribers within the franchise area. Detailed work of this type takes months, and based on the often-contrasting viewpoints of the cable companies, ensuing negotiations take years.

While this has taken many months and, in a number of cases, multiple years per franchise negotiation, members and their local franchising authorities have done this to ensure that PEG channels and capacity are negotiated into franchises in a manner that reflects the best interests of the residents/constituents (including hundreds of thousands of cable subscribers), Public Access and Educational Access beneficiary entities, and the cable operators.

In fact, after a recent after a cable-related "community needs assessment" was conducted concerning Comcast's franchise area in Charles County with the data presented to them in 2016, the negotiations over the need for high-definition ("HD") PEG capacity have continued for more than one year, and are just now moving toward conclusion. The cable-related "community needs assessment" specified a need for four HD channels, simulcast of the current four standard-definition ("SD") channels: Public Access and Higher Educational Access provided by the College of Southern Maryland; K-12 Educational Access provided by Charles County Public Schools (CCPS); and the County's Government Access Channel. However, taking into account the costs stated by Comcast, the County is set to potentially agree to only half of the HD channels determined through the Needs Assessment. The County continues to negotiate in good faith.

The reach of PEG channels and programming in Charles County is far beyond individual residents/producers and extends to a host of community and non-profit organizations, economic development groups, ethnic and minority entities, arts and cultural entities, and senior and youth organizations. All of these entities would be disenfranchised from the cable platforms, if this capacity were to be offset against the very franchise fees already used in many cases to support operations. Ultimately, if that occurs, the residents of Charles County completely lose out, whether they are students, parents, businesses, economic development representatives, community non-profit organization members, subscribers/viewers/consumers of the substantial amount of hyper-local programming developed or residents/video producers (speakers) by not being able to produce or provide this content to subscribers throughout the County.

Charles County is an excellent example of where a competing operator is able to continue to invest in a separate, overbuilt system, expand it as necessary and continue to provide modern services to subscribers, regardless of the reasonable PEG capacity requirements that have been negotiated with them. For example, approximately seven years after Comcast acquired the Jones Intercable System and negotiated a franchise with Charles County, Verizon FiOS negotiated an equivalent franchise with the County and began overbuilding much of the territory served by Comcast and, in fact, provided service to some areas not served by Comcast.

Verizon FiOS has competed vigorously with Comcast and has increased its market share, such that it now is the dominant provider in Charles County, all the while having the same PEG capacity and other PEG requirements contained in the franchise agreement with Comcast. Notwithstanding this, Verizon has continued to enhance its offerings to subscribers. Clearly, PEG capacity requirements have not hampered Verizon's system development and investment. It is notable that both Comcast and Verizon continue to expand their systems in the County, based on the return on investment models they have developed in consideration of their shareholders' desires. An impartial observer would have to conclude, then, that it is not PEG capacity requirements that are hampering system development and investment.

II. COMMENTS OF CHARLES COUNTY IN RESPONSE TO THE FCC'S SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

Through its "Second Further Notice of Proposed Rulemaking" in the matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), adopted September 24, 2018 and published in the Federal Register on October 14, 2018 (hereinafter "FNPRM"), the Federal Communications Commission (hereinafter "FCC") has proposed to issue new rules interpreting relevant statutory provisions of the Cable Act. Charles County, Maryland submits the following comments.

A. The FCC Lacks Rulemaking Authority to Impair Private Franchise Contracts

In the FNPRM, the FCC tentatively concludes that, "we should treat cable-related 'in-kind' contributions required by a franchising agreement as 'franchise fees' subject to the statutory five percent cap on franchise fees set forth in Section 622 of the Communications Act of 1934, as amended ('the Act'), with limited exceptions."[1] However, the FCC lacks any statutory or rulemaking authority to issue rules enabling it to interfere in private franchise agreement contracts. Explicitly, the FCC has no basis, at law or statute, to impair or alter the obligations of private contracts by unilaterally "treating" as "franchise fees" non-franchise fee payments.

Regarding the Congressional delegation of regulatory authority to the FCC to interpret provisions of the Act, Section 201(b) of the Communications Act provides, in relevant part, that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."[2] Here, the FCC's proposed rule to treat cable-related "in-kind" contributions required by a franchising agreement as "franchise fees" subject to the statutory five percent cap on franchise fees is not necessary in the public interest to carry out the provisions of the Act. There is no portion of the Act establishing "in-kind contributions" that the FCC is carrying out.

Though the Act itself contains certain guide-rail requirements and prohibitions regarding the provision of cable services, the Act does not revoke all rights of two sophisticated parties to obligate themselves to any legally-accepted terms upon which they agree. In the "Cable Franchise Agreement" between the County Commissioners of Charles County, Maryland and Comcast Cablevision of Maryland, Inc., effective June 5, 2002, the two parties agreed that, "any costs to the Franchisee [Comcast] associated with the provision of support for PEG access pursuant to this Agreement do not constitute and are not part of a franchise fee, and fall within one or more of the exceptions to 47 U.S.C. § 542."[3] Nothing in the Act prohibits Commenter and Comcast from reaching such a private contractual agreement. And, nothing in the Act authorizes the Commission to impair a private franchise agreement between Commenter and Comcast.

The FCC's proposed rule would impair the private franchise agreement contract between these two sophisticated parties by forcing the "treatment" of non-franchise fee payments as "franchise fees," subject to the five percent statutory cap. Indeed, the proposed rules would destroy the private contract between these parties, and many others. Section 201(b) of the Act does not grant the FCC such broad and unchecked authority. Accordingly, Charles County respectfully urges the FCC to decline to issue its proposed rules claiming to "treat" cable-related "in-kind" contributions required by a franchising agreement as "franchise fees" subject to the statutory five percent cap.

B. Section 622 of the Act is Unambiguous on the Definition of "Franchise Fees"

In the FNPRM, the FCC states, "we tentatively conclude that we should treat cable-related, in-kind contributions required by LFAs from cable operators as a condition or requirement of a franchise agreement as 'franchise fees' subject to the statutory five percent franchise fee cap set forth in Section 622 of the Act…We tentatively conclude that this interpretation is most consistent

[1] 83 FR 51911, 51913.
[2] 47 U.S.C. § 201(b).
[3] "Cable Franchise Agreement between the County Commissioners of Charles County, Maryland and Comcast Cablevision of Maryland, Inc.", effective June 5, 2002.

with the statutory language and legislative history and seek comment on our analysis."[4] Charles County responds in comment that the FCC's aforementioned interpretation is wholly inconsistent with the unambiguous statutory language and the historical legislative record.

In Section 622 of the Act, Congress precisely and unambiguously defines "franchise fees." Charles County responds to the FNPRM by commenting that: (1) the FCC's proposed rules treating "in-kind contributions" as "franchise fees" are impermissible because Congress has directly addressed the questions at issue by employing precise, complete, and unambiguous statutory language; (2) the FCC's invention of "in-kind contributions" and forced treatment of such as "franchise fees" is an impermissible construction of the Act; and (3) the FCC has acted arbitrarily and capriciously in inventing "in-kind contributions" and treating them as "franchise fees" subject to the statutory five percent franchise fee cap without adequate reasoning.

(1) The FCC's Proposed Rules Are Impermissible Because Congress Employed Precise, Complete, and Unambiguous Statutory Language in Section 622 of the Act

To the extent that the Act vests the FCC with the underlying rulemaking authority to carry out the "provisions of this Act," including Section 622, any subsequent formal order or rule issued thereupon would be subject to a deference analysis by a Court under the framework established in *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Because Congress has directly addressed the questions at issue by employing precise, unambiguous statutory language in Section 622 of the Act, the FCC's proposed rules re-imagining of what constitutes a "franchise fee" are impermissible. Only Congress may alter or amend federal law.[5]

In *Chevron*, the Supreme Court recognized the principle of deference to administrative interpretations to conclude that, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer."[6] Yet, deference to administrative interpretations is not absolute. The Commission's act of rulemaking is informed by the recognition that, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."[7]

Where deference is warranted, the initial question under step one of the *Chevron* framework is "whether Congress has directly spoken to the precise question at issue" by employing precise, unambiguous statutory language.[8] When conducting the inquiry required by *Chevron*'s first step, a court's primary goal is to, "effectuate legislative intent using traditional tools of statutory interpretation."[9] In harnessing these tools of statutory interpretation, a court must construe statutory language "in pertinent context rather than in isolation."[10]

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[4] 83 FR 51911, 51914-51915.

[5] USCS Const. Art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

[6] *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (*Chevron*).

[7] *Id*. at 843, n.9.

[8] *Chevron*, 467 U.S. at 842.

[9] *Estate of Gerson*, 507 F.3d at 439.

[10] *Id*.

Here, a court would need look no further than the plain meaning rule (the most elemental tool in the canon of statutory interpretation). The United States Supreme Court discussed the plain meaning rule in *Caminetti v. United States*, 242 U.S. 470 (1917), reasoning:

> "[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain…the sole function of the courts is to enforce it according to its terms. **Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion.** Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them." [11]

The Court in *Caminetti* further advised, "as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."[12]

There is no ambiguity in the statutory language in "PART III—FRANCHISING AND REGULATION" of the Act, Section 622, "Franchise Fees." Congress has directly spoken to the precise question at issue by employing precise, unambiguous statutory language. There is no ambiguity in the statutory language that, "any cable operator may be required under the terms of any franchise to pay a franchise fee."[13] There is no ambiguity in the statutory language that, "the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[14]

And there is certainly no ambiguity in the statutory language defining "franchise fees." Pursuant to Section 622(g), franchise fee has an explicit, textually precise definition:

> "[f]or purposes of this section--(1) the term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such; (2) the term "franchise fee" does not include—(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);…(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities; (D) requirements or charges incidental to the awarding or enforcing of the franchise,

[11] *Caminetti v. United States*, 242 U.S. 470, 482 (1917).
[12] *Id*. at 490.
[13] 47 U.S.C. § 542(a).
[14] 47 U.S.C. § 542(b).

including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or (E) any fee imposed under title 17.[15]

While broad, the plain text definition of franchise fee is not all-encompassing. The statutory language is textually precise in its limitation of the definition of franchise fee. First, it is unambiguous in its inclusion of only, "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber."[16] These are not catch-all terms. The words tax[17], fee[18], and assessment[19] are terms of art and have precise meaning established by lengthy precedent.[20] Congress chose not to draft the statutory language to include other forms of value transfer, such as grants, external costs, or charges, in the statutory definition of franchise fees.

In fact, by the plain language of Section 622, Congress is also textually precise in exempting certain forms of value transfer from ever being classified as a franchise fee. For example, pursuant to Section 622(g)(2), the term "franchise fee" does not include, "capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities," nor does it include, "requirements or charges incidental to the

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15 47 U.S.C. § 542(g).

16 *Id.*

17 *Black's Law Dictionary* 1628 (Rev. 4th ed. 1968) ("[t]o impose a tax; to enact or declare that a pecuniary contribution shall be made by the persons liable, for the support of government."). *See also*, *In re Mytinger*, D.C.Tex., 31 F.Supp. 977, 978, 979. (Tax is a pecuniary burden laid upon individuals or property to support the government, and is a payment exacted by legislative authority.); *Heirs v. Mitchell*, 95 Fla. 345, 116 So. 81, 85. (Tax is an enforced contribution of money or other property, assessed in accordance with some reasonable rule or apportionment by authority of a sovereign state on persons or property within its jurisdiction for the purpose of defraying the public expenses.); *City of Newark v. Jos. Hollander, Inc*. (136 N.J.Eq. 539, 42 A.2d 872, 875. (Tax, in its essential characteristics, is not a debt.).

18 *See*, *Fort Smith Gas Co. v. Wiseman*, 187 Ark. 675, 74 S.W.2d 789, 790. (A fee is a charge fixed by law for services of public officers or for use of a privilege under control of a government.); *Craig v. Shelton*, 201 Ky. 790, 258 S.W. 694. (A fee is a recompense for an official or professional service or a charge or emolument or compensation for a particular act or service.)

19 *Black's Law Dictionary* 150 (Rev. 4th ed. 1968) ("[t]he listing and valuation of property for the purpose of apportioning a tax upon it, either according to value alone or in proportion to the benefit received.") *See also*, *Commissioner of Internal Revenue v. Patrick Cudahy Family Co.*, C.C.A.7, 102 F.2d 930, 932. (Properly speaking, [assessment] does not include the levy of taxes.); *Collister v. Kovanda*, 51 Ohio App. 43, 199 N.E. 477, 478 (Assessment is also popularly used as a synonym for taxation in general, the authoritative imposition of a rate or duty to be paid, but in its technical signification it is only taxation for a special purpose or local improvement, or local taxation, as distinguished from general taxation.); *In re Walker River Irr. Dist.*, 44 Nev. 321, 195 P. 327, 330. ("An assessment is doubtless a tax, but the term implies something more; it implies a tax of a particular kind, predicated upon the principle of equivalents, or benefits, which are peculiar to the persons or property charged therewith, and which are said to be assessed or appraised, according to the measure of proportion of such equivalents; whereas a simple tax is imposed for the purpose of supporting the government generally, without reference to any special advantage which may be supposed to accrue to the persons taxed. Taxes must be levied, without discrimination, equally upon all the subjects of property whilst assessments are only levied upon lands, or some other specific property, the subjects of the supposed benefits, to repay which the assessment is levied.").

20 *See e.g.*, *Hale v. Kenosha*, 29 Wis. 599. (As distinguished from other kinds of taxation, "assessments" are those special and local impositions upon property in the immediate vicinity of municipal improvements which are necessary to pay for the improvements, and are laid with reference to the special benefit which the property is supposed to have derived therefrom.)

awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages."[21]

Finally, Section 622(i) of the Act further limits the Commission's role, proscribing that, "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section."[22] Congress has spoken to the precise questions at issue by employing precise, unambiguous statutory language as to whether the Commission may regulate the amount of franchise fees paid by a cable operator. As mandated by the plain language of the statute, any decision or agreement regarding the amount of franchise fee payments paid by the cable operator may not be regulated by the Commission.

The initial question under step one of the *Chevron* framework is "whether Congress has directly spoken to the precise question at issue" by employing precise, unambiguous statutory language.[23] The rules proposed by the FCC in its FNPRM, if enacted, would be impermissible because Congress has indeed directly spoken to the precise question at issue by employing precise, unambiguous statutory language concerning "franchise fees" and the Commission's role in regulating the amount of "franchise fees" paid by a cable operator. Insofar as Section 622 of the Act is plain and admits of no more than one meaning, the duty of interpretation does not arise.

(2) The FCC's Proposed Rules Fail to Define "In-Kind" Contributions and Thwart the Intent of Congress, Thereby Creating an Impermissible Construction of the Act

If a statute is silent or ambiguous with respect to the specific issue before it, the second step of the *Chevron* analysis is whether the agency's answer is based on a permissible construction of the statute.[24] Assuming, *arguendo*, that Section 622 of the Act is silent or ambiguous with respect to what constitutes a "franchise fee," the FCC's invention of "in-kind contributions" and forced treatment of such as "franchise fees" subject to the five percent cap is nevertheless an impermissible construction of the Act. First, the FCC's FNPRM does not even define what "in-kind contribution" means. And second, the FCC's proposed rule would impair the existing operation of the Act and have the effect of thwarting the intent of Congress.

Thus far, the FCC has failed to comprehensively define "in-kind contributions." Via a series of orders,[25] and judicial determinations[26] thereupon, and now the FNPRM, the FCC is trying to unilaterally re-define "franchise fees." In support of its quest, the FCC has devised, out of whole

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21 47 U.S.C. § 542(g)(2).
22 47 U.S.C. § 542(i).
23 *Chevron*, 467 U.S. at 842.
24 *Singh v. Gonzales*, 451 F.3d 400, 403-04 (6th Cir. 2006) (*citation and quotation marks omitted*).
25 *See*, Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 22 FCC Rcd. 5101 (March 5, 2007) (hereinafter "First Order"); Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 72 Fed. Reg. 13230-01 (proposed March 21, 2007) (to be codified at 47 C.F.R. pt. 76); Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 22 FCC Rcd. 19633 (Nov. 6, 2007) ("Second Order"); Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 30 FCC Rcd. 810 (January 21, 2015) ("Reconsideration Order").
26 *See*, *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (*Alliance*); *Montgomery County, Md et al. v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017) (*Montgomery County*).

cloth, the alien concept of "in-kind contributions". In *Montgomery County, Md. et al. v. FCC* the United States Court of Appeals for the Sixth Circuit adjudicated claims against the FCC's Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 22 FCC Rcd. 19633 (Nov. 6, 2007) (hereinafter "Second Order") and the FCC's Implementation of Section 621(a)(1) of the Cable Communications Policy Act, 30 FCC Rcd. 810 (January 21, 2015) (hereinafter "Reconsideration Order"). The Court in *Montgomery County* ruled, "the FCC has offered no explanation as to why the statutory text allows it to treat 'in-kind' cable-related exactions as franchise fees…And, apart from a fleeting reference in the Reconsideration Order, the FCC has not even defined what 'in-kind' means."[27]

Montgomery County further undercut the FCC's argument by observing, "that the term "franchise fee" can include noncash exactions, of course, does not mean that it necessarily *does* include every one of them."[28] (emphasis in original.) Moreover, the FCC's FNPRM and prior Orders attempt to distinguish between payments that do not involve the provision of cable services and payments unrelated to the provision of cable services. This is an improper construction of the statute. As the Court in *Montgomery County* ruled, the FCC "assumes that these (undefined) terms have some objectively discernable meaning as used in the Order—which they do not."[29]

In the FNPRM, the FCC acknowledges the admonition delivered to it by the Court in *Montgomery County*, writing, "[t]he court also stated that the FCC failed to define what "in-kind" means. The court therefore vacated as arbitrary and capricious the *Second Report and Order* and the *Order on Reconsideration* to the extent that they treat cable-related, "in-kind" exactions as "franchise fees" under Section 622(g)(1). The court directed the Commission to determine and explain on remand to what extent cable-related, in-kind contributions are 'franchise fees' under the Act."[30] Yet, the FCC's FNPRM does not plainly or precisely define "in-kind" contributions or payments, whether cable-related or non-cable-related. Because the FCC is inventing "in-kind" contributions as a new category of payments, but has not defined such "in-kind" contributions, much less the distinction between cable-related or non-cable-related, its proposed rule is an improper construction of Section 622 of the Act.

In the NPRM, the FCC relies entirely on its own interpretation of "cable-related" exactions versus "non-cable-related" exactions. The FCC claims, "[t]he court's decision in Montgomery County did not disturb the Commission's treatment of in-kind contributions **unrelated to the provision of cable services** as franchise fees subject to the statutory five percent cap. We see no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable-related, in-kind contributions for purposes of the five percent franchise fee cap."[31] (emphasis added.)

Yet, this distinction is irrelevant because it is non-existent at law. No basis in the statute or legislative history can be found. The statute does not support the FCC's conclusion because Congress rejected any such notion of distinguishing between cable-related and non-cable related

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[27] *Montgomery County, Md et al. v. FCC*, 863 F.3d 485, 491 (6th Cir. 2017)
[28] *Id*. at 491.
[29] *Id*. at 490.
[30] 83 FR 51911, 51914.
[31] *Id*. at 51915.

exactions. The FCC's proposed rule that distinguishes between "cable-related exactions" versus "non-cable-related" exactions is therefore an improper construction of Section 622 of the Act. Effect must be given to Congress's words without regard to any divergent interpretation offered by the FCC.

The FCC's proposed rules are also an improper construction of the statute because such rules would impair the existing operation of the Act and have the effect of thwarting the intent of Congress. For example, the FCC's proposed rules altering Section 622 would render a fatal blow to Section 626(c)(1), "Renewal," which sets forth the standard upon which a local franchising authority must decide whether or not to renew a cable operator's franchise. Specifically, Section 622(c)(1) provides that, "upon submittal by a cable operator of a proposal to the franchising authority for the renewal of a franchise…the franchising authority shall…consider whether (A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law; (B) the quality of operator's service…(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and (D) **the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking in to account the cost of meeting such needs and interests**."[32] (emphasis added.)

Section 626(a)(1) clearly specifies that a franchising authority may, "on its own initiative…commence a proceeding which affords the public in the franchise area appropriate notice and participation for the purpose of (A) identifying the future cable-related community needs and interests, and (B) reviewing the performance of the cable operator under the franchise during the then current franchise term."[33] More broadly, pursuant to Section 626(c)(1)(D), the local franchising authority is vested with the right to consider whether the cable operator's franchise renewal proposal meets the community's future cable-related needs, depending on the cost of meeting those needs.[34]

On the one hand, the "community needs assessment" examines whether the operator's proposal is "reasonable" to meet future cable-related community needs and interests. On the other hand, the cable operator's obligation to meet such community needs must be considered in light of the cost of meeting such needs. In practice, cable-related "community needs assessments" include surveys, focus groups, interviews, public meetings and community-specific research that is designed to identify the cable-related needs of a wide variety of community components, such as residents (both subscribers and non-subscribers), community organizations, businesses, educational and governmental institutions, non-profits, and providers of the PEG channels. This information is then utilized in franchise negotiations for the cable operator to make a proposal (either "formal" or "informal"), designed to meet the community needs.

Upon review of a cable-related "community needs assessment," the local franchising authority determines whether "the operator's proposal is reasonable to meet the future cable-related needs and interests, taking into account the cost of meeting such needs and interests."[35]

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[32] 47 U.S.C. § 546(c)(1).
[33] 47 U.S.C. § 546(a)(1).
[34] 47 U.S.C. § 546(c)(1)(D).
[35] *Id.*

Given that local franchising authorities are legally entitled to franchise fees of up to five percent of gross revenues, the "cost" of meeting the community's franchise renewal needs must refer to costs in excess of the five percent. These costs typically include, but are not limited to, PEG channel financial support, provided that such support is used for capital costs.

The FCC's proposed rule, if issued, will have the result of mooting the "community needs assessment" of Section 626(c)(1)(D), thereby thwarting the intent of Congress. If PEG financial support, and, for that matter, the value of PEG channels themselves, become subject to the five percent statutory cap, then such costs in excess of five percent could never be compensated, no matter how reasonable. Furthermore, if the costs of so-called "in-kind" contributions count toward the five percent cap on "franchise fees," local franchising authorities will not be able to impose these requirements in the first place, thereby thwarting Congress's intent in enacting those provisions.

The FCC's proposed rules to classify all in-kind contributions as "franchise fees" under Section 622 would also eviscerate franchisees' PEG capital cost obligations. If PEG capital costs are classified as "franchise fees," and therefore can be offset against franchise fee revenues to the local government, then there would be no actual cost to the franchisee. Cable operators would be getting a free ride on municipal rights-of-way. The FCC's proposed rules appear as a naked attempt to aid and abet cable operators' desire to reduce their legally-mandated financial obligations to the local franchising authorities. Viewed in context, the FCC's proposed rules are an impermissible construction of the Act. Accordingly, Charles County respectfully urges the FCC to decline to issue these proposed rules.

(3) The FCC's Expansion of the Definition of "Franchise Fees" and its Interpretation of the Act are Arbitrary and Capricious

In the FNPRM, the FCC concludes that, "[i]f in-kind contributions unrelated to the provision of cable services were not treated as franchise fees, LFAs [local franchising authorities] could easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee. Likewise, if cable-related, in-kind contributions are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee. We believe this result would be contrary to Congress's intent as reflected in the broad definition of "franchise fee" in the statute. We seek comment on this analysis."[36] Both conclusions are erroneous. Charles County responds in comment that both the FCC's decision to expand the definition of "franchise fees" in the Act and the FCC's interpretation of the Act is arbitrary and capricious.

The FCC's proposed rules inventing "in-kind" contributions and classifying them as franchise fees subject to the five percent cap is a fundamental alteration of the Act, specifically Section 622 governing franchise fees. The FCC is repeating the same mistake it was remanded to fix by the Court in *Montgomery County*, namely, "those orders contain scarcely any explanation at all for the FCC's decision to expand its interpretation of "franchise fee" to include so-called "in-kind" cable-related exactions…[t]hus, the FCC has offered no explanation as to why the statutory

[36] 83 FR 51911, 51915.

text allows it to treat "in-kind" cable-related exactions as franchise fees."[37] In its FNPRM, the FCC has not performed any analysis, nor provided any reasonable basis in statute or fact, to explain its decision to expand the definition of "franchise fees." Accordingly, the FCC's proposed rules are an arbitrary and capricious exercise of its rulemaking authority.

In addition, the FCC's proposed rules are general and hypothetical. The Commission has not performed any fact-finding or data analysis to support its legal conclusions. The FNPRM's legal interpretations lack rigor and the proposed rules reveal an absence of adequate reasoning grounded in statute to support its decision-making. "One of the basic procedural requirements of administrative rulemaking is that an agency must give adequate reasons for its decisions."[38] Thus, "if an agency wants the federal courts to adopt (much less defer to) its interpretation of a statute, the agency must do the work of actually interpreting it. The FCC's orders reflect none of that work as to the question of whether "in-kind" cable-related exactions are "franchise fees" under § 541(g)(1)."[39]

For example, as detailed in the quote above from the FNPRM, the FCC concludes that the current statutory scheme allows local franchising authorities to "easily evade the five percent cap by requiring any manner of in-kind contributions, rather than a monetary fee." Similarly, the FCC concludes the current statutory scheme allows local franchising authorities to "circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee." The FCC has not provided any empirical data, analysis or reasoning to support its conclusions; both are erroneous.

The first error is the conclusion that cable operators are "required" to remit "any manner in-kind contributions, rather than a monetary fee." Local franchising authorities can never "require" payment or transfer of value beyond what's currently authorized by the statute. That is to say, cable operators are not ever coerced, forced, threatened, or required to sign cable franchising agreements they don't accept. The FCC's unsupported assumption that local franchising authorities dictate such non-monetary exactions, other forms of value transfer, reflects a fundamental misunderstanding of the franchise renewal process.

The Cable Act contemplates a franchise negotiation between the local franchising authority and the cable operator and this is what has occurred in jurisdictions throughout the country for the last 34 years since the enactment of the Act. Local franchising authorities lack the legal right to "require" cable operators to make contributions to their communities and they almost never receive the contributions they seek. Whether it be in the form of PEG financial support, high-definition (HD) video format for PEG channels, preservation of institutional networks ("I-Nets"), or other benefits, there is a genuine negotiation between the parties. Depending on the specific needs of the jurisdiction and the reasonableness of the cable operator, these negotiations often last 1-2 years.

Cable operators are not prohibited by the statute from negotiating the provision of additional payment or transfer of value, such as free or discounted cable services to public schools and libraries, in exchange for concessions they desire from local franchising authorities. The

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[37] *Montgomery County* at 491.
[38] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[39] *Montgomery County* at 491.

FNPRM does not identify even a single instance or legal claim alleging that a local franchising authority impermissibly "required" a cable operator to provide or remit "in-kind" contributions or any type of value constituting "franchise fees" in excess of the five percent cap. It borders on absurdity to suggest that local franchising authorities are "requiring any manner of in-kind contributions, rather than a monetary fee" or even that they have negotiating leverage over cable operators, many of whom are multi-billion dollar corporations. Such claims by the FCC in the FNPRM are not supported in fact or practice.

The second error is the conclusion that local franchising authorities are somehow "evading" or "circumventing" the franchise fee cap in the current statutory regime to collect in excess of five percent in "franchise fee" payments. The undisputed language of Section 622 plainly states that, "the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services."[40] Should a local franchising authority attempt to collect an amount exceeding five percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services, cable operators are not powerless. Cable operators, never known to shy away from litigation, are possessed with the right to file legal claims alleging violations of the statute.

Indeed, the statute specifically and broadly grants standing such that, "any cable operator adversely affected by any final determination made by a franchising authority…may commence an action…which may be brought in--(1) the district court of the United States for any judicial district in which the cable system is located; or (2) in any State court of general jurisdiction having jurisdiction over the parties."[41] Accordingly, any local franchising authority that impermissibly denies a franchise application or renewal to a cable operator on the basis of the operator's refusal to pay "franchise fees" in excess of the five percent cap can be subject to judicial review of its actions.

The FCC's FNPRM does not identify even a single instance or legal claim asserting that a local franchising authority is impermissibly attempting to "evade" or "circumvent" the five percent cap on franchise fees by requiring any manner of in-kind contributions, rather than a monetary fee. The FCC's proposed rules are a solution in search of a problem. Lacking evidence of the FCC's basic or reasonable diligence interpreting the statutes at issue, the rules proposed in the FNPRM are arbitrary and capricious. Therefore, Charles County respectfully urges the FCC to decline to issue its proposed rules.

C. Section 622 of the Act is Unambiguous that PEG Capital Costs are Not "Franchise Fees" Subject to 5% Cap

In the FNPRM, the FCC writes, "for any franchise granted after 1984, Section 622(g)(2)(C) contains a narrow exclusion covering PEG [Public, Educational, and Governmental] 'capital costs which are required by the franchise.' The legislative history explains that with, "regard[] [to] PEG access in new franchises, payments for capital costs required by the franchise to be made by the cable operator are not defined as fees under this provision."…[a]ccordingly, under the statute, for

[40] 47 U.S.C. § 542(b).
[41] 47 U.S.C. § 555(a).

purposes of franchises granted after 1984, we tentatively conclude that PEG capital costs required by the franchise are in-kind cable related contributions excluded from the five percent cap. We seek comment on the above analysis."[42] Charles County responds in comment that it agrees in part, and disagrees in part, with the conclusion of the FCC.

Charles County agrees with the conclusion of the FCC that, for purposes of franchises granted after 1984, PEG capital costs required by the franchise are not "franchise fees" and are therefore excluded from the five percent cap. Section 622 of the Act is abundantly clear. The plain, unambiguous language states, "the term 'franchise fee' does not include…(C) in the case of any franchise granted after October 30, 1984, capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities."[43] Unambiguously, capital costs incurred by the cable operator for public, educational, or governmental ("PEG") access facilities are statutorily excluded from classification as "franchise fees."

Charles County disagrees with the conclusion of the FCC that PEG capital costs required by the franchise are "in-kind cable-related contributions." Support for this interpretation does not exist in the statute. The plain, unambiguous language of the statute is clear, rendering impermissible the FCC's invention of "in-kind cable-related contributions" as a categorization for PEG capital costs. At statute, PEG capital costs are PEG capital costs; they are not "in-kind cable-related contributions." Effect must be given to Congress's words without regard to any divergent interpretation offered by the FCC.

During the enactment of Section 622(g)(2)(C), Congress made clear that it intended this provision to reach, "capital costs associated with the construction of [PEG] access facilities."[44] In clarifying the precise scope of the term "PEG access facilities," Congress further explained that it refers to "channel capacity (including any channel or portion of any channel) designated for public, educational, or governmental use, as well as facilities and equipment for the use of such channel capacity."[45] In further detail, Congress specified that "[t]his may include vans, studios, cameras, or other equipment relating to the use of public, educational, or governmental channel capacity."[46]

According to the Court in *Alliance for Community Media v. FCC*, 529 F.3d 763, "the unambiguous expression of Congress confirms that 'PEG access capacity' extends not only to facilities but to related equipment as well…[Even] the [Federal Communications Commission] concedes that its definition of 'capital costs' covers the expense of equipment as long as it is 'incurred in or associated with the construction of PEG access facilities.'"[47] In addition to PEG access capacity, some examples of equipment expensed in association with the construction of PEG access facilities includes: video cameras; video signal output engineering monitors; digital audio mixing consoles; sold-state recorders; video editing equipment; mobile production vans; video over ethernet encoder/ decoder pairs; optical transmitters and receivers; SDI cabling and

[42] 83 FR 51911, 51915. *(Internal citations omitted)*.
[43] 47 U.S.C. § 542(g).
[44] H.R. Rep. No. 98-934, at 26.
[45] H. R. Rep. No. 98-934, at 45.
[46] *Id.*
[47] *Alliance for Community Media v. FCC*, 529 F.3d 763, 785.

routing; server-based playback systems; studio monitoring; LED studio lighting systems; character generators; audio microphones; TV monitors; assisted listening devices; and ancillary equipment.

In such instance where ambiguity is forcibly read into the statute, the FCC's attempt to re-classify PEG capital costs as "in-kind cable-related contributions" is an impermissible construction of the statute that thwarts Congressional intent. Absent adequate diligence interpreting the statute and providing the reasoning for its decisions, the FCC's interpretation of the Act is arbitrary and capricious. Accordingly, Charles County respectfully urges the FCC to decline to issue its proposed conclusion that, "PEG capital costs required by the franchise are in-kind cable-related contributions."[48]

D. Section 611 of the Act is Unambiguous that PEG Channels and PEG Capacity are PEG Capital Costs and Not "Franchise Fees" Subject to 5% Cap

In the FNPRM, the FCC writes:

> "[T]he Act authorizes LFAs to require that channel capacity be designated for PEG use…be designated for educational and governmental use. The fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees. Indeed, the statute suggests otherwise. Section 622(g)(2) carves out only limited exclusions for PEG-related costs—*i.e.*, PEG support payments required by any franchise granted prior to 1984 and PEG capital costs required by any franchise granted after 1984…[b]ased on this, we tentatively find that treating all cable-related, in-kind contributions as 'franchise fees,' unless expressly excluded by the statute, would best effectuate the statutory purpose. To the extent that an LFA wishes to impose such obligations, the LFA can count the value of the services or facilities towards the cable operator's franchise fee payment, if the services or facilities are not exempt from the franchise fee cap in Section 622(g)(2). In our view, an LFA should not be permitted to make an end run around the statutory cap by requiring a cable operator to pay franchise fees equal to five percent of its gross revenues for cable services and also assume the costs of cable-related, in-kind contributions. We seek comment on this view."[49]

Charles County responds in comment that the relevant statutory text is unambiguous; PEG channels and PEG capacity are PEG capital costs, specifically excluded as "franchise fees" by Section 622(g)(2)(c).

During the enactment of Section 622(g)(2)(C), Congress made clear that it intended this provision to reach, "capital costs associated with the construction of [PEG] access facilities."[50] In clarifying the precise scope of the term "PEG access facilities," Congress further explained that it refers to "channel capacity (including any channel or portion of any channel) designated for public,

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[48] FR 51911, 51915. *(Internal citations omitted).*
[49] 83 FR 51911, 51915-51916. *(Internal citations omitted).*
[50] H.R. Rep. No. 98-934, at 26.

educational, or governmental use, as well as facilities and equipment for the use of such channel capacity."[51]

The cost of capacity and channels is indivisible from the statutory requirement that franchisees must designate and provide "channel capacity for public, educational, or governmental use."[52] The FCC's proposed interpretation of PEG capacity and PEG channels as "cable-related, in-kind contributions" considered "franchise fees" subject to the five percent statutory cap is impermissible because Congress has directly spoken to the questions at issue by employing precise, complete, and unambiguous statutory language. Accordingly, Charles County respectfully urges the FCC to decline to issue its proposed rules.

PEG channels and capacity are statutorily required as "PEG channels and capacity" and not "cable-related, in-kind contributions" of any sort. Effect must be given to Congress's words without regard to any divergent interpretation offered by the FCC. Furthermore, the plain text of the statute vests local franchising authorities with exclusive possession and control of PEG channels and capacity. The local franchising authority is even vested with the right to "hold" the PEG channel capacity open for itself in the future and prohibit the cable operator from using it for the provision of other cable or internet services.[53]

As a condition of an initial franchise or franchise renewal, local franchising authorities are statutorily vested with authority to establish requirements for designation or use of PEG channels. Section 611(a), "Cable Channels for Public, Educational, or Governmental Use" prescribes that, "[a] franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or government use."[54]

As a condition of franchising licensing or renewal, local franchising authorities are also statutorily vested with authority to require PEG capacity for public, educational, or governmental use. Section 611(b) dictates that, "[a] franchising authority may…require as part of a franchise…that channel capacity be designated for public, educational, or governmental use…and may require rules and procedures for the use of the channel capacity designated pursuant to this section."[55] Cable operators cannot classify as "in-kind" an obligation which they are legally bound to fulfill.

Critically, the statute explicitly vests franchising authorities with legal rights of action against cable operators with respect to the continuous provision of PEG channels and PEG capacity. Local franchising authorities may, "enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity."[56] The statute does not cap the local franchising authorities' enforcement right at a value of five

[51] H. R. Rep. No. 98-934, at 45.
[52] 47 U.S.C. § 531(b).
[53] 47 U.S.C. § 531(d).
[54] 47 U.S.C. § 531(a).
[55] 47 U.S.C. § 531(b).
[56] 47 U.S.C. § 531(c).

percent of a cable operator's gross revenues. Combined, the statute unambiguously grants local franchising authorities a broad right to require PEG channels and PEG capacity, as well as a broad right to enforce a requirement for PEG channels and PEG capacity.

The statute is unambiguously constructed so that PEG channels and PEG capacity are PEG capital costs. The FNPRM states that, "[t]he fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees."[57] Commenter disagrees. The fact that Section 622(g)(2)(c) specifically excludes PEG capital costs is the reason that the value of these obligations should be excluded from the five percent cap on franchise fees.

If the statute is determined to be silent or ambiguous, the FCC's proposed interpretation of the statute is an impermissible construction that will thwart Congressional intent. The statute permits cable operators to pass-through certain PEG costs to subscribers. Section 622(c) states that, "[e]ach cable operator may identify…the amount of the total bill assessed to satisfy any requirements imposed on the cable operator by the franchise agreement to support public, educational, or governmental channels or the use of such channels."[58] Given that cable operators are legally passing-though the PEG channel capacity and PEG financial support costs to cable subscribers, the FCC cannot classify as "cable-related, in-kind contributions" costs that cable operators are not actually incurring. It is cable subscribers, not cable operators, that actually pay for these PEG-related costs.

Equally problematic, the FCC's proposed rule to re-classify PEG channels and PEG capacity as "cable-related in-kind contributions" would entitle cable operators to 'double-dip' on PEG-related costs. At the same time that cable operators are legally passing-through PEG-related costs pursuant to the statute, the FCC's proposed rules would allow them to count the same PEG-related costs towards meeting their franchise fee obligations. Hence, the FCC's proposed interpretation of the statute is an impermissible construction that would thwart Congressional intent.

Based on the plain meaning of the clear and unambiguous text of the law, PEG channels and PEG capacity are statutorily-created rights of the local franchising authority and statutorily-created obligations upon the cable operator. These obligations are not, however, without reward for the cable operator. They are the fundamental obligations cable operators must observe in exchange for undisturbed access to the public rights-of-way. The statute rejects classifying PEG channels themselves or PEG capacity as "cable-related in-kind contributions." Unambiguously, PEG channels and PEG capacity are PEG capital costs, specifically excluded as "franchise fees" by Section 622(g)(2)(c).

E. The Act is Unambiguous that Institutional Network ("I-Net") Capacity is Not "Franchise Fees" Subject to 5% Cap

In the FNPRM, the FCC writes:

[57] 83 FR 51911, 51915-51916. *(Internal citations omitted).*
[58] 47 U.S.C. § 542(c)(2).

> "[T]he Act authorizes LFAs to require that channel capacity be designated for PEG use and that channel capacity on I-Nets be designated for educational and governmental use. The fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees…Section 622(g)(2) makes no mention of an I-Net-related exclusion, nor does it contain a general exclusion for all PEG related costs. Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded those costs in addressing the scope of the PEG-related costs in that subsection if it had intended they not count toward the cap…We seek comment on this view."[59]

And yet, the FNPRM also concedes, "[w]e reiterate that nothing in this Order is intended to limit LFAs' express authority under Section 611(b) of the Act, 47 U.S.C. § 531(b), to require I-Net capacity."[60] Charles County responds in comment that the relevant statutory text is unambiguously broad; the cost of institutional network ("I-Net") capacity is indivisible from the statutory requirement that franchisees must designate and provide capacity on institutional networks.

The text of Section 611 plainly states that, "a franchising authority may…require as part of a franchise…that channel capacity be designated for public, educational, or governmental use, and **channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.**"[61] (emphasis added.) Section 611 further specifies, "[f]or purposes of this section, the term 'institutional network' means a communication network which is constructed or operated by a cable operator and which is generally available only to subscribers who are not residential subscribers."[62]

Notably, the statute vests franchising authorities with legal rights of action against franchisees with respect to the continuous provision of I-Net capacity for educational or governmental use. Local franchising authorities may, "enforce any requirement in any franchise regarding the providing or use of such channel capacity. Such enforcement authority includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to public, educational, or governmental use of channel capacity."[63] The statute does not cap the local franchising authorities' enforcement right at a value of five percent of a cable operator's gross revenues.

Combined, the statute unambiguously grants local franchising authorities a broad right to require channel capacity on I-Nets, as well as a broad right to legally enforce a requirement for I-Net capacity. Without ambiguity, I-Net capacity is statutorily-required as, "channel capacity on institutional networks" and not "cable-related, in-kind contributions" of any sort. Cable operators cannot classify as "in-kind" an obligation which they are legally bound to fulfill. Also, cable operators retain unadulterated ownership of institutional networks, so there is no in-kind

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[59] 83 FR 51911, 51915-51916. *(Internal citations omitted).*
[60] 83 FR 51911, 51916, at fn 107.
[61] 47 U.S.C. § 531(b).
[62] 47 U.S.C. § 531(f).
[63] 47 U.S.C. § 531(c).

contribution of the asset itself, only capacity on the I-Net. Effect must be given to Congress's words without regard to any divergent interpretation offered by the FCC.

The statute is unambiguously constructed so that I-Net capacity is a legal obligation without respect to cost. The FNPRM states that, "[t]he fact that the Act authorizes LFAs to impose such obligations does not, however, mean that the value of these obligations should be excluded from the five percent cap on franchise fees." [64] Commenter disagrees. The fact that Section 611(b) specifically mandates capacity on I-Nets without limitation of cost is the reason that the value of these obligations should be excluded from the five percent cap on franchise fees.

If the statute is determined to be silent or ambiguous, the FCC's proposed interpretation of the statute is an impermissible construction that will thwart Congressional intent. Section 622(c) of the statute permits cable operators to pass-through certain I-Net costs to subscribers.[65] Given that cable operators are legally passing-though the institutional network construction costs to cable subscribers, the FCC cannot classify as "cable-related, in-kind contributions" costs that cable operators are not actually incurring. It is cable subscribers, not cable operators, that actually pay for these institutional networks and construction costs.

Additionally, the FCC's proposed rule to re-classify I-Net capacity as "cable-related in-kind contributions" would entitle cable operators to 'double-dip' on I-Net capacity costs. At the same time that cable operators are legally passing-through I-Net costs pursuant to the statute, the FCC's proposed rules would allow them to count the same I-Net costs towards meeting their franchise fee obligations. Hence, the FCC's proposed interpretation of the statute is an impermissible construction that would thwart Congressional intent.

F. The Act Unambiguously Rejects the Invention of "Cable-Related In-Kind Contributions" and the Invention of a "Fair Market Valuation" Methodology for Non-Monetary "Franchise Fees"

In the FNPRM, the FCC writes, "[w]e further propose that cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value. We seek comment on this proposal, and how such a market valuation should be performed. Alternatively, we seek comment on whether cable-related, in-kind contributions should be valued at the cost to the cable operator."[66] Charles County responds extensively in comment above that the invention of "cable-related, in-kind contributions" is impermissible.

(1) The Act Prohibits the FCC from Exercising Rulemaking Authority to Regulate the Amount of a Franchise Fee

Charles County now responds in comment that the FCC's proposed rule to invent a fair market valuation methodology for the purposes of calculating the franchise fee cap is not authorized by any statute or rulemaking authority. Franchise agreements are private contracts negotiated at arms-length within the boundaries of the law. Whereas Section 201(b) enables the

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64 83 FR 51911, 51915.
65 47 U.S.C. § 542(c)(2).
66 83 FR 51911, 51916.

Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," the Act specifically restricts the Commission's jurisdiction to regulate the amount of franchise fees.

Section 622(i), "Regulatory Authority of Federal Agencies" plainly states, "[a]ny Federal agency may not regulate the amount of the franchise fees paid by a cable operator."[67] If issued, the FCC's proposed rules would force portions of the franchise fees paid by cable operators to be valued according to a Commission-invented methodology, thereby directly setting the total amount of franchise fees to be paid by the cable operator. Under the FCC's proposed rules, but for a Commission-imposed fair market valuation on "cable-related, in-kind contributions," the amount of franchise fees payable would be decided exclusively between a cable operator and a local franchising authority. Therefore, the FCC's proposed rules are tantamount to a statutorily-prohibited regulation of the "amount" of the franchise fees paid by a cable operator.[68]

Charles County also responds to the FNPRM's proposed rules on fair market valuation by commenting that: (1) the FCC's proposed rules that so-called "cable-related, in-kind contributions" be "valued for purposes of the franchise fee cap at their fair market value" are impermissible because Congress has directly spoken to the questions at issue by employing precise, complete, and unambiguous statutory language in the Act; (2) the FCC's invention of a fair market valuation methodology is an impermissible construction of the Act that thwarts the intent of Congress; and (3) the FCC has acted arbitrarily and capriciously in inventing a fair market valuation methodology, in contravention to the Act, without adequate explanation or reasoning.

(2) The Act Rejects a Fair Market Valuation Methodology for Franchise Fees

Finally, discussing the methodology to determine the valuation of a statutorily impermissible category labeled "cable-related, in-kind contributions" seems academic. Nevertheless, the FNPRM proposes a "fair market value" for such so-called "cable-related, in-kind contributions" and the FCC is soliciting comment on the same. Assuming, *arguendo*, that "cable-related, in-kind contributions" means "franchise fees" subject to the five percent statutory cap, the "fair market value" of monetary-based "cable-related, in-kind contributions" is the cash value.

Assuming, *arguendo*, that "cable-related, in-kind contributions" are instead non-monetary "franchise fees", numerous statutory exclusions apply to the FCC's proposed rule to value them at fair market value. The non-monetary costs of build-out requirements can never be "cable-related, in-kind contributions." The non-monetary requirements or charges "incidental to the awarding or enforcing of the franchise" can never be "cable-related, in-kind contributions."[69] Any non-monetary imposition "under title 17, United States Code" can never be "cable-related, in-kind contributions."[70] And, in the case of any franchise granted after October 30, 1984, non-monetary "capital costs which are required by the franchise to be incurred by the cable operator for public,

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[67] 47 U.S.C. § 542(i).
[68] *Id*.
[69] 47 U.S.C. § 542(g)(2)(D).
[70] 47 U.S.C. § 542(g)(2)(E).

educational, or governmental access facilities," including PEG channel costs, PEG capacity costs, and other PEG capital costs, can never be "cable-related, in-kind contributions."[71]

(3) The Act Restricts the Fair Market Value of PEG Channels and PEG Capacity to Zero Dollars

Elsewhere in the FNPRM, the FCC has suggested that PEG channel costs and PEG capacity costs are "cable-related in-kind contributions" and Charles County has commented in objection thereupon. Assume, *arguendo*, that PEG channel non-monetary costs and PEG capacity non-monetary costs are "cable-related in-kind contributions" that must be "valued for the purposes of the franchise fee cap at their fair market value."[72] The FNPRM seeks comment on this hypothetical scenario, and how such a market valuation should be performed.[73] Charles County comments in response that such a fair market valuation can only be performed strictly and faithfully according to the statutory language of the Act.

Under the Act, the fair market value of PEG channels and PEG capacity is zero dollars. The reason is that the statute unambiguously prohibits a PEG channel, or its capacity, from being used as anything other than a PEG channel and capacity. First, only local franchising authorities have a legal right to own and operate PEG channels and capacity. Second, every local franchising authority has the legal right to require that cable operators provide it with PEG channels and capacity. Third, PEG channels and capacity may only be programmed by public access community producers ("P" channel), local educational institutions ("E" channel), or local governments ("G" channel).

Fourth, all commercial activities, such as local advertising and home shopping, are prohibited on PEG channels and capacity. Fifth, all commercial programming is prohibited on PEG channels and capacity. Sixth, the technical bandwidth occupied by PEG channels and PEG capacity is *de minimis*.[74] And seventh, cable operators cannot exercise control over PEG channels and capacity; the Act allows local franchise authorities to hold their PEG channels and capacity open, even if programming is inactive. If a local franchising authority chooses not to exercise its right to PEG channel capacity, a cable system can absorb the capacity, but cannot "sell" excess PEG capacity. During renewal, a local franchising authority can request, and must by law receive, PEG channels and capacity. In short, the plain language of the statute prevents PEG channels and PEG capacity from having any commercial market or value.

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[71] 47 U.S.C. § 542(g)(2)(C).
[72] 83 FR 51911, 51916.
[73] *Id*.
[74] Since PEG capacity has no commercial value, the only cost to the cable operator for providing such capacity is the capital cost of provisioning PEG channels. This would include capital costs such as hardware and installation. Once implemented, such items require very little maintenance and continue to enable the full use of the capacity for the provision of hyper-local PEG programming, all the way from the Access origination site to the master headend where the PEG channel is then placed into a QAM group with other channels and subsequently becomes part of the cable operator's overall distribution and delivery system to the cable subscriber's set-top unit. These capital costs are so minor as to merit disregard. Spread out over the typical duration of a 10-year franchise, the equipment cost would be fully depreciated even before the end of the franchise term, such that the book value is zero by the time the franchise ends.

Additionally, putting a fair market value on PEG channel capacity is inconsistent with the fundamental purpose of PEG access and the legislative history of the Act. The intrinsic value of PEG channels is high to the public, because it is a source of relevant local programming and promotes the transparency of local government; however, PEG capacity is designed for only public, educational and governmental purposes, and so has no commercial value. PEG channel capacity is negotiated, balancing the needs of the community versus the impact it will have on the remaining capacity that the cable operator uses for commercial purposes.

The FCC's proposal that "cable-related, in-kind contributions be valued for purposes of the franchise fee cap at their fair market value" must be rejected. If the relevant statutory text is unambiguous, Courts must "give effect to Congress' answer without regard to any divergent answers offered by the agency or anyone else." *Hadden v. United States*, 661 F.3d 298, 301 (6th Cir. 2011). As demonstrated above, in the context of the Cable Act, Congress has made clear that PEG channels and PEG capacity have zero fair market value. Accordingly, Charles County respectfully urges the FCC to decline to issue rules formalizing such a proposal.

III. CONCLUSION

For the reasons stated forth herein, Charles County strongly urges the FCC to decline to issue an order implementing the rules proposed in its FNPRM. Charles County respectfully thanks the FCC and its Commissioners for the opportunity to submit comments in response to its FNPRM.

Respectfully submitted,

/s/ Joel S. Winston

Joel S. Winston, Esq.
Daniel S. Cohen, Esq.

Cohen Law Group
413 S. Main Street
Pittsburgh, PA 15215
Tel. (412) 447-0130
www.CohenLawGroup.org

ON BEHALF OF

Charles County, Maryland
200 Baltimore Street
La Plata, MD 20646
Tel. (301) 645-0553
www.CharlesCountyMD.gov